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No. (1)

Supreme Court, U.S.
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In The
Supreme Court of the United States

VELMA Y. LOCK,

Petitioner,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The law of this Court is that a public employee with a property right in continued employment is entitled to pre-disciplinary notice and the opportunity to respond. Similarly, tenured federal employees are entitled to advance notice and may be removed only for cause. In this case, the agency noticed Petitioner's removal for, *inter alia*, issuing an "unauthorized sole source" order. But the Merit Systems Protection Board upheld Petitioner's removal only because the order "exceeded the [contract's] competitive" threshold, even though the agency never noticed that as a reason for removal, even though the agency admitted that "exceed[ing] the competitive" threshold was proper if done in accordance with applicable sole source exceptions. MSPB made no findings, etc., *vis-à-vis* the applicable sole source exceptions. Despite that, the appeals court entered judgment for the agency, as it does at an "astronomical affirmance rate," by summarily affirming, as it does at a "substantial" rate, in federal employment appeals.

Whether the appeals court's summary affirmance of Petitioner's removal on a basis not noticed, not satisfying cause, was a neglect of duty and a denial of due process, conflicting with this Court's precedence.

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IN THE UNITED STATES SUPREME COURT

No. _____

VELMA LOCK,

PETITIONER,

v.

GENERAL SERVICES ADMINISTRATION,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Velma Lock petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The judgment of the court of appeals was issued July 10, 2009 and is reprinted at 328 Fed. Appx. 662 (Fed. Cir. 2009). Pet. App. 1-3. The order denying rehearing was issued August 10, 2009. Pet.

App. 74-76. The opinion of the Merit Systems Protection Board is reported at 107 M.S.P.R. 219 (2007). Pet. App. 16-20. That opinion summarily affirmed the administrative judge's decision (Pet. App. 21-73) and remanded for a decision on the penalty. The administrative judge's decision on penalty became final on December 8, 2008. Pet. App. 4-15.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 2009. Pet. App. 1-3. A petition for rehearing was denied on August 10, 2009. Pet. App. 74-76. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides that "No person shall ... be deprived of life, liberty, or property, without due process of law."

The pertinent provisions of the Civil Service Reform Act of 1978, Pub L. No. 95-454, 92 Stat 1111 (5 U.S.C. § 1101 *et seq.*) provide that "an agency may take an action ... against an employee only for such cause as will promote the efficiency of the service" and that an employee is entitled to "at least 30 days advance written notice." 5 U.S.C. § 7513(a) and (b).

The pertinent provision of The Federal Circuit Rules of Practice, 2008 edition, specifically Federal

Circuit Rule 36, Entry of Judgment – Judgment of Affirmance Without Opinion, has been reproduced at Pet. App. 77.

STATEMENT OF THE CASE

Petitioner was a 29-year federal employee. She earned highly successful and outstanding performance appraisals and was a tenured employee who could be removed only after notice and for cause. 5 U.S.C. § 7511(a)(1)(A). The agency removed her just short of retirement-eligibility.

She worked in the General Services Administration's Federal Technology Service (FTS) in San Francisco, CA. Her job was to place orders against the agency's 8(a)FAST contracts (Federal Acquisition Services for Technology contracts).

The 8(a)FAST contracts were "multiple award/indefinite delivery, indefinite quantity" (MAIDIQ) contracts for information technology equipment and services. The 8(a)FAST contracts were set-asides in SBA's 8(a)Small Business Development Program for disadvantaged businesses.[1] A centerpiece of FAST was to foster business development skills: Contractors were encouraged to self-market to federal agencies. 13 C.F.R. § 124.3.[2] The FAST contracts were among

[1] 15 U.S.C. § 637(a); 48 C.F.R. § 19.800.

[2] Self-marketing involved selling the idea, developing the specs, statement of work, technical requirements, etc., and bringing the deal to GSA.

the agency's fee-for-service Government-wide contracts against which other agencies could order.

Orders could be placed non-competitively up to $3,000,000; according to the agency, $3,000,000-plus orders, including self-marketed orders, had to be offered to other FAST contractors, unless a sole source exception applied under 48 C.F.R. § 16.505(b)(2). A40, 80, 471-471.1 (lines 6-10), 484 (lines 11-12).[3] The FAST contracts used simplified ordering procedures from the Federal Acquisition Streamlining Act (FASA), e.g., fair opportunity to be considered instead of competition, no protests, etc.[4]

In early 2000, SMF, Inc., a FAST contract holder, self-marketed to the U.S. Dept. of Health and Human Services (HHS) requirements to supply and install $8,667,000 of Tivoli software.

In July 2000, Petitioner placed an order against SMF's FAST contract for those requirements, and in February 2001, she modified that order to add $9,533,935 of additional Tivoli

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[3] "A" refers to the original appendix filed with the appeals court.

[4] Pub. L. No. 103-355 (Oct. 13, 1994). FASA is codified in scattered sections of Title 10 of the United States Code for military agencies and Title 41 of the Code for civilian agencies. FASA allowed noncompetitive orders under $2,500; the agency bumped that up to $3,000,000 in the FAST contracts and often referred to noncompetitive orders as sole sources, a misuse of terminology that may have caused confusion.

software. Both the order and the mod[5] were self-marketed and neither was competed. SMF was the only FAST contractor Tivoli-certified to install the software. A332 ¶15, 333 ¶18, 525-27, 625-26, 627-28. When Petitioner placed these orders, she briefed her supervisors and entered the orders into the agency's database, monitoring system. No one raised any question.

In February 2002, HHS asked GSA to restructure the deal. After that proved futile, HHS refused to pay, causing an inter-agency dispute as well as an SMF default claim. That claim was settled by GSA for several million. HHS and GSA split the settlement liability.

In December 2003, the agency removed Petitioner for "improper contracting transactions," noticed as three distinct reasons: (1) not committing HHS, (2) placing orders outside the scope of the contract, and (3) circumventing competition. Pet. App. 29-35, 40.

The "circumventing competition" reason was noticed in the alternative: "circumvented competition" or "unauthorized sole source." Pet. App. 33-34. The agency specified that Petitioner "circumvented competition," since the orders, according to the agency, were outside the scope of the FAST contract and should have been competed as new contracts. *Id.* Alternatively, the agency specified that even if the orders "had been within the scope of SMF's contract [they] would still have

[5] Sometimes referred to collectively as the "orders."

constituted an *unauthorized sole-source* procurement." *Id.*, emphasis added.

Petitioner appealed to the Merits Systems Protection Board (MSPB).[6] After hearings, the MSPB administrative judge found that Petitioner had contractually committed HHS and that the orders were within the scope of SMF's contract. Pet. App. 40-55. Because the orders were within scope, that left "unauthorized sole source" as the only thing noticed as improper, as supposedly circumventing competition, etc.

As to the "unauthorized sole source" charge, Petitioner defended with testimony from, *inter alia*, the former Tivoli representative on the deal and from SMF, both saying that SMF was the only FAST contractor Tivoli-certified to install Tivoli software. A332 ¶15, 333 ¶18, 525-27, 625-26, 627-28. SMF was the only Tivoli-certified, HHS-cleared FAST contractor. A191, 324 (¶6), 524-26. These witnesses also confirmed that HHS needed Tivoli software for reasons of compatibility and HHS's heavy investment in Tivoli, the deal being an "upgrade" of HHS's existing system. A208-09, 215-16, 321 (¶2), 523 (lines 8-20), 614-15. And Petitioner showed that her orders met all sole source requirements in the

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[6] The [MSPB] was created to assume the adjudicatory functions of the old [Civil Service] commission and, with certain exceptions, those functions passed unchanged from the Commission to the [MSPB]." *Department of Navy v. Eagan*, 484 U.S. 518, 531 n.6. The MSPB reviews agency disciplinary actions. 5 U.S.C. § 7513(d). When an employee appeals to the MSPB, it is the agency's burden to prove its charge by preponderant evidence. 5 U.S.C. § 7701(c)(1)(B).

applicable regulations,[7] which included no prior authorization requirement from the competition advocate or otherwise. A189-93, 198-200, 207-09, 215-17, 317-18 (¶¶9, 11-13, 15-18), 345.1-.3 (¶¶107-16), 523-26, 614-17.

For the agency's part, it acknowledged that sole source orders could exceed $3,000,000. The FAST program director testified that $3,000,000-plus sole sources were proper if placed in accordance with 48 C.F.R. § 16.505: "FAR 16,5-0-5 [that] gives four exceptions ... ... one is that there's only one source....***. ... over and above that $3 million, we abide by the rules of FAR Part 16.5." A471 (lines 6-16), 484 (lines 11-12). Other than incorrectly arguing that 48 C.F.R. Part 6 (basic competition part) imposed a prior authorization requirement, the agency bet its case on the orders being out of scope. The agency acknowledged that it did not question an ordering agency's software selection, and it put in no evidence to rebut SMF being the only Tivoli-certified FAST contractor.

Notwithstanding the "unauthorized sole source" charge and the parties' sole source evidence, the administrative judge made no sole source findings, explicit or implicit, and offered no sole source discussion. Pet. App. 55-63. Instead, he upheld Petitioner's removal because the orders exceeded $3 million: "I find the agency established ... the ... order[s] exceeded the competitive requirements [$3,000,000] of the FAST contract.

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[7] 48 CFR § 16.505(b)(4) (July 2000, February 2001) required that the rationale of the order be documented in the contract file and included no competition advocate authorization.

Accordingly, this portion of the agency's specification is SUSTAINED." *Id.*, at 62. In other words, the administrative judge held that the $3,000,000 threshold was a *"sole-source limitation."* *Id.*, at 61 n6, emphasis added. But the agency had never noticed or argued that the $3,000,000 threshold was a *"sole-source limitation."*

Both Petitioner and the agency sought MSPB review of the administrative judge's decision. MSPB summarily affirmed and remanded to the administrative judge for a penalty decision. Pet. App. 16-20.

Petitioner again submitted evidence that there was only one source. The agency filed a declaration that, at the very most, expressed skepticism but did not rebut Petitioner's single source evidence. At prehearing on remand, the administrative judge acknowledged that he did not decide the "unauthorized sole source" issue, considering it irrelevant, given his interpretation that the $3,000,000 threshold was a "sole-source limitation."

The administrative judge upheld the penalty of removal, again referring to the $3,000,000 threshold as a "sole-source limitation" and finding not competing to be serious enough to support removal. Pet. App. 8-9.

Petitioner allowed the administrative judge's penalty decision to become final, December 8, 2008; on December 10, 2008 she appealed to the U.S. Court of Appeals for the Federal Circuit, the court

having exclusive jurisdiction of federal employment appeals under 28 U.S.C. § 1295(a)(9) ("appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to sections 7703(b)(1) and 7703(d) of title 5").

The court summarily affirmed MSPB's decision to remove Petitioner. Pet. App. 1-3. The court gave no explanation at oral argument or in its summary affirmance order. The appeals court affirms at an "astronomical" rate and uses summary affirmance at a "substantial" rate.

On August 10, 2009, the appeals court denied Petitioner's petition for rehearing. Pet. App. 74-76.

REASONS FOR GRANTING THE PETITION

After 29 years of faithful government service, Petitioner was deprived of her livelihood and permanently branded as unworthy, a stigma that will follow her wherever and whenever she seeks employment. And that was done without notice, without cause: Petitioner was removed simply because her orders exceeded $3,000,000, something the agency never noticed as improper, something the agency admitted was proper.

The Court should review this case not just because the damage done to a life is so devastating and the error is so clear and egregious. Equally important, that damage is the product of a recurring problem: the court's "substantial" use of summary affirmance and its "astronomical" affirmance rate in Title V federal employment appeals. That recurring

problem has erased any confidence that Title V federal employment appeals will be treated fairly, that the courts are there for federal employees. The practical effect of that recurring problem, given the court's exclusive jurisdiction, does violence to Congress's Title V scheme to "balance the legitimate interests of ... federal employees with the needs of ... efficient administration." *See United States v. Fausto*, 484 U.S. 439, 445 (1988). And the substantial use of summary affirmance masks, as here, conflicts with the precedence of this Court.

The disregard of rights and the destruction of lives, livelihoods, and basic fairplay is no more unfair in criminal cases than it is in these cases. If ever a case begged for this Court's intervention and supervision to correct clear and egregious error and to remedy a systemic problem, this is that case. Here, the appeals court used summary affirmance to circumvent this Court's precedence, deny basic rights, and find favorably for the agency. And it did so on a record where it would be impossible for the court to write a decision favorable to the government or to point to anything that Petitioner did improperly. Just reversal on the merits or granting, vacating, and remanding for a written decision would restore confidence that fairness will be afforded Title V federal employment appeals.

1. The Court of Appeals Misused Summary Affirmance To Find For The Agency Despite Clear Legal Error By MSPB and No Record Evidence Favorable To The Agency.

Summary affirmance is only proper in certain enumerated conditions:

> Rule 36. Entry of Judgment – Judgment of Affirmance Without Opinion
>
> The court may enter a judgment of affirmance without opinion, citing this rule, when it determines that any of the following conditions exist and an opinion would have no precedential value:
>
> (a) the judgment, decision, or order of the trial court appealed from is based on findings that are not clearly erroneous;
>
> (b) the evidence supporting the jury's verdict is sufficient;
>
> (c) the record supports summary judgment, directed verdict, or judgment on the pleadings;
>
> (d) the decision of an administrative agency warrants affirmance under the standard of review in the statute authorizing the petition for review; or

> (e) a judgment or decision has been entered without an error of law.

Federal Circuit Rule 36. Put another way, summary affirmance should only be used "when the [government] is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists...." *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994). None of the above is present here.

Summary affirmance was improper because the MSPB decision erred as a matter of law: It did not decide the charge noticed. The law and the heart of due process is that the reason noticed is the only reason at issue: MSPB cannot decide an action on a basis not noticed. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 539 n.5 (1985) (An agency "cannot escape its constitutional obligations by rephrasing the basis for termination...."); *Burroughs v. Department of Army*, 918 F.2d 170, 172 (Fed. Cir. 1990) (agency must prove all elements of its charge or the charge falls); *Alvarado v. Dept. of Air Force*, 97 M.S.P.R. 389 ¶ 9 (2004) ("[W]e are bound to decide this case according to how the charge is written, not how it could or should have been written. The agency is required to prove the charge as it is set out in the notice...."). After MSPB found the orders were within scope, the only noticed misconduct remaining was "unauthorized sole-source procurement."

But the MSPB decision did not decide the "unauthorized sole-source" charge. *Cf.*, Pet. App. 33-34 *with* 61-63. MSPB made no "unauthorized sole source" findings, and offered no "unauthorized sole

source" discussion. *Id.* at 55-63. Instead, MSPB upheld Petitioner's removal on a basis never noticed: The orders exceeded $3,000,000, treating the $3,000,000 threshold as a "sole-source limitation." *Id.* at 61-63; *see also* 8-9. Put differently, the agency charged a failure to comply with a sole source exception to the general rule but MSPB decided only the general rule. The administrative judge's decision on penalty continued to treat the $3,000,000 threshold as a "sole-source limitation."[8] *Id.*, at 8-9.

Summary affirmance was also improper because MSPB's decision further erred, legally and factually: It upheld removal without a valid finding of cause. It upheld Petitioner's removal simply because the orders exceeded $3,000,000. But the undisputed record evidence is that there was nothing wrong, without more, with a sole source exceeding $3,000,000. A471 (lines 6-16), 484 (lines 11-12). One: The noticed charge ("unauthorized sole source") acknowledges that there can be proper, authorized sole sources above $3 million. Pet. App. 33. Two: The FAST contracts say that sole sources above $3,000,000 are proper if in accord with the exceptions "as listed in FAR16.505(b)(2)." A125. Three: The applicable regulations, 48 C.F.R. § 16.505(b)(4) (2000-01), say that a sole source

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[8]Ironically, MSPB said that not competing was so serious as to support the removal penalty. But since the unrebutted evidence proved SMF was a single source, it was impossible to compete. It is inappropriate and a disservice to other contractors to compete just for "cover," when there is no realistic expectation of two or more offers. (OFPP, OMB) *Best Practices for Multiple Award Task and Delivery Order Contracting*, Chpt. 5, Interim Edition, July 1987, Updated February 19, 1999; *see also* 48 C.F.R. § 19.805-1(a).

"exceeding the competitive requirements" was proper, if the contract file is documented. Four: All FAST guidance was that a $3,000,000-plus sole source was allowed. A80. And five: The FAST director testified on direct, as part of the agency's case, that $3,000,000-plus sole sources were allowed: "Q: ...circumstances where you don't have to compete over $3 million? A:..FAR 16,5-0-5 gives four exceptions to fair opportunity ... one is that there's only one source....***. ... over and above that $3 million, we abide by the rules of FAR Part 16.5." A471.1 (lines 6-11); 484 (lines 11-12).

Quite simply, there is no record evidence whatsoever to support Petitioner's removal, to support a finding of "unauthorized sole source." Petitioner proved that SMF was the only Tivoli-certified FAST contractor. In response, the agency expressed only skepticism. Petitioner proved that HHS needed Tivoli software. In response, the agency acknowledged it did not question a client's software selection. Petitioner's documentary exhibits proved that the contract file met 48 C.F.R. § 16.505(b)(4)'s requirements to document the contract file. In response, the agency filed no "contract file" documents and simply nitpicked. And Petitioner proved that the applicable regulations 48 C.F.R. § 16.505(b)(2) contained no "authorization" requirement and that 48 C.F.R. Part 6, relied on by the agency for an authorization requirement, did not apply. In response, the agency admitted on argument before the appeals court that Part 6 did not apply. Thus, the charge of "unauthorized sole source" is not only without record support, it is legally defective.

Summed up, the appeals court inappropriately used Rule 36 in a situation not provided for.

2. The Court of Appeal's Affirmance Denied Petitioner Due Process, Upheld Her Removal Without Cause, And That Conflicts With This Court's Controlling Precedence.

The court of appeals has exclusive jurisdiction over appeals from the MSPB. 5 U.S.C. § 7703. Thus, decisions of the court seldom conflict with other circuits but they can, as in this case, conflict with precedence of this Court. Such conflicts can be commonly masked, as here, in a misuse of summary affirmance. Here, there are two significant conflicts.

First, this Court's precedence is that a tenured public employee with a property right in continued employment can not be deprived of his or her livelihood without constitutionally adequate procedures, notice, etc. *Loudermill*, 470 U.S. at 542 ("An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice'" and the opportunity to respond); 5 U.S.C. § 7513(b) (federal employees are entitled to advance notice of the reasons for discipline).

And second, this Court's precedence is that tenured federal employees may be removed only for cause as defined in 5 U.S.C. § 7513(a). *Arnett v. Kennedy*, 416 U.S. 134 (1974) (property interest in employment held by federal employees; can be disciplined only for cause).

Here, Petitioner was tenured and could be removed only after notice and only for cause. 5 U.S.C. §§ 7501, 7513(a) and (b); *see Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1376 (Fed. Cir. 1999). But Petitioner was removed for a basis not noticed (exceeding $3,000,000) rather than for the basis noticed ("unauthorized sole source"). And Petitioner was removed without cause, the agency admitting that just exceeding $3,000,000, was not improper. The appeals court can point to nothing in MSPB's decision or in the record that Petitioner did improperly. Given that, the appeals court's use of summary affirmance masked its noncompliance with this Court's precedence.

3. This Petition Presents An Important Problem Calling For The Court's Intervention: The Appeals Court's "Astronomical Affirmance Rate" And "Substantial" Use of Summary Affirmance In Title V Appeals Has Discouraged Appeals, Eroded Confidence.

Confidence is basic to our system. This Court has often recognized that a possible misapplication of the federal civil service laws by the court of appeals is sufficiently important to warrant review. *See, e.g., LaChance v. Erickson*, 522 U.S. 262 (1998); *Carlucci v. Doe*, 488 U.S. 93 (1988); *Fausto, supra*; *Department of Navy v. Egan*, 484 U.S. 518 (1988); *Cornelius v. Nutt*, 472 U.S. 648 (1985); *see also Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89 (1983); *Bush v. Lucas*, 462 U.S. 367 (1983). "The exclusive jurisdiction of the Federal Circuit makes its decisions ... crucial..." to the largest workforce in the country. Robert G. Vaughn, *Merits*

Systems Protection Rights & Remedies 17-14.1 (rev. ed., Law Journal Press 2009) [hereinafter Vaughn, *Merit Systems*].

The appeals court affirms Title V federal employment appeals at an "astronomical affirmance rate." Paul Secunda, *Whither the Pickering Rights of Federal Employees?* 2 (2007) (available at: http://works.bepress.com/paul_secunda/4). The appeals court "sustain[s] the MSPB in the vast majority of appeals." Vaughn, *Merits Systems* at 17-14.1. "The Federal Circuit almost always sustains the MSPB's decisions." Passman & Kaplan, *Federal Employees Legal Survival Guide* 91 (2d ed., NERI 2004). "The MSPB's affirmance rate in the Federal Circuit tends to be in the 95% range most years." Harold Ashner, *Winning At The Merit Systems Protection* 640 (Dewey Publications 2002) [hereinafter Ashner, *Winning at MSPB].* "[T]he reversal rate ... diminished to a 1% reversal rate for FY 2002." Peter Broida, *Guide to MSPB Law and Practice* 3999 (Dewey Publications 2003) [hereinafter Broida, *Guide 2003*]. "The reversal rate ... ran about 7% in 2008.... By comparison, in commercial cases ...the reversal rate was about 18% for FY2008. Peter Broida, *Guide to MSPB Law and Practice* 3268 (Dewey Publications 2009) [hereinafter Broida, *Guide 2009*]. "The Federal circuit has affirmed at a rate of at least 95% over the years. [Y]ou need to think carefully about expending the time, energy, and money in the Federal Circuit...." Peter Broida, *MSPB Basics: A Guide for the Distressed and Perplexed* 126 (Dewey Publications 2004).

The court's affirmance rate is not wholly explainable by the deferential standard of review.[9] 5 U.S.C. § 7703(c). The law is that an agency must prove its action by preponderant evidence before the MSPB. 5 U.S.C. § 7701(c)(1)(B)(2000). Federal agencies do not, quite obviously, get it right ninety-plus percent of the time, and do not even come close in "lawyered appeals." The court has said that "many of our Petitioners in MSPB cases are underachievers." *Ferrone v. Dept. of Labor*, 797 F.2d 962, 963 (Fed. Cir. 1986).

The court's "astronomical affirmance rate" is made possible by its "substantial" use of summary affirmance: "The court has disposed of a substantial number of appeals from the MSPB by summary affirmance and has sustained the MSPB in the vast majority of appeals." Vaughn, *Merits Systems* at 17-15. Referring to the court's use of summary affirmation as "substantial" understates the extent of the problem. The court almost always issues a written decision, albeit often *pro forma*, in *pro se* cases but not in "lawyered" appeals, presumably complex and potentially meritorious appeals.

This high affirmance rate and substantial use of summary affirmance destroys confidence in the court's treatment of Title V appeals. While federal employee appeals used to be the vast majority of appeals in the court, this is no longer the case and the trend is indeed down. *See* U. S. Court of Appeals for the Federal Circuit, Appeals Filed in Major Origins, (available at

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[9] Again, the issue raised by Petitioner herein is not a substantial evidence issue; it is a pure legal issue.

http://www.cafc.uscourts.gov/pdf/10yrHistCaseldByOriginin99-08.pdf). There is "a trend of fewer MSPB appeals from the MSPB to the Federal Circuit." Broida, *Guide 2003* at 3999.

Going further, that landmark Guide cautions that lawyers should "[t]hink long and well before encouraging a client to undertake the expense of appellate litigation." Broida, *Guide 2009 at* 3268.

Another prominent text suggests that "[a]n appellant may prefer" to allege discrimination as a means of avoiding the Federal Circuit and seek judicial review in a U.S. District Court. Ashner, *Winning at MSPB* at 635.

> Some lawyers believe that a fair result may be obtained only by taking a case into district court on a discrimination issue, thereby placing both civil service and EEO issues before a district judge (or jury) who hears the evidence *de novo* on EEO issues (civil service issues are considered 'on the record' by the judge alone).

Broida, *Guide 2009* at 3268 (Dewey Publications 2009). Also, that Federal-Circuit-avoidance tactic has the advantage of allowing counsel to deal with the U.S. Attorney who is more receptive to mediation, settlement.

Title V federal employment appeals are clearly an unwanted stepchild in the appeals court's jurisdiction. And that is reflected in the loss of

confidence in the appeals court as exhibited by federal employees and, more importantly, by skilled federal employment attorneys.

There is no better example of a disservice done to a livelihood in a Title V appeal than this case. Here the issue is purely legal and the evidence is not disputed. Just summary reversal or just granting, vacating, and remanding for a written decision could easily achieve future compliance with this Court's precedence and restore confidence in the appeals court's treatment of Title V federal employment appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Renn C. Fowler
Counsel of Record
THE FOWLER PRACTICE
1 Grove Street
Belfast, Maine 04915
(207) 338-1474

[ENTERED: July 10, 2009]

NOTE: This disposition is nonprecedential.

United States Court of Appeals
for the Federal Circuit

2009-3080

VELMA Y. LOCK,

Petitioner,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Renn C. Fowler, The Fowler Practice, of Belfast, Maine, and Frederick P. Hink, Law Offices of Frederick P. Hink, of Easton, Maryland, argued for petitioner.

Lauren A. Weeman, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for respondent. With her on the brief were Michael F. Hertz, Acting Assistant Attorney General, Jeanne E. Davidson, Director, and Brian M. Simkin, Assistant Director.

Appealed from: Merit Systems Protection Board

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2009-3080

VELMA Y. LOCK,

Petitioner,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Judgment

ON APPEAL from the Merit Systems Protection Board

in CASE NO(S). SF0752040183-I-7.

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

Per Curiam (MAYER and BRYSON, Circuit Judges and SPENCER, Chief District Judge.*)

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED Jul 10 2009 /s/
Jan Horbaly, Clerk

* The Honorable James R. Spencer, Chief Judge, United States District Court for the Eastern District of Virginia, sitting by designation.

[ENTERED: November 3, 2008]

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

VELMA Y. LOCK,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Agency.

DOCKET NUMBER
SF-0752-04-0183-I-7

DATE: November 3, 2008

Renn C. Fowler, Esquire, Belfast, Maine, and Frederick P. Hink, Esquire, Easton, Maryland, for the appellant.

Debora Finch, San Francisco, California, for the agency.

BEFORE
Jeremiah Cassidy
Regional Director

INITIAL DECISION

INTRODUCTION

On December 19, 2003, the agency removed the appellant from employment as a GS-12 Technology Project Advisor with the agency's Federal Technology Service (FTS) in San Francisco, California, based on improper contracting transactions. *See* Appeal File (AF), Agency File, Tabs 4A & 4B. The appellant timely appealed the agency's action to the Board. *See,* Appeal File (AF), Tab 1. In my March 15, 2007 initial decision, I reversed in part, sustained in part, and remanded the appeal to the agency for further consideration of the penalty. The appellant filed a petition for review of my decision with the Board, and the agency then filed a cross-petition for review. *See* Petition for Review File (PFRF), Tabs 1 & 4. Subsequently, the Board issued a decision denying both petitions, affirming my decision as modified by the Board's decision, and remanding the appeal to the agency for further consideration of the. penalty. *See Lock v. General Services Administration* 107 M.S.P.R. 219 (2007). The agency then issued a second decision letter stating the charges I had sustained in my March 15, 2007 initial decision were a sufficient basis to support the appellant's removal from employment. *See* Remand Appeal File (RAF), Tab 1. Then appellant then refiled her appeal. *Id.* Because the appellant withddrew her request for a hearing, my decision is based on the written record. *See* RAF, Tab 26.

For the reasons set forth below, the agency's action is AFFIRMED.

EFFICIENCY OF THE SERVICE

Having found that the agency supported the charge against the appellant by a preponderance of the evidence, I must also consider whether the agency's action was taken for such cause as promotes the efficiency of the service. *See* 5 U.S.C.A. § 513(a); 5 C.F.R. § 752.403(a) (2008). In an analogous case, the Board found that discipline imposed against an agency employee for improper dealings with agency contractors promoted the efficiency of the service. *See Fontes v. Department of Transportation,* 51 M.S.P .R. 56, 60 (1991). Accordingly, I find that the agency's decision to discipline the appellant for her misconduct promotes the efficiency of the service.

REASONABLENESS OF THE PENALTY

Where an agency charge is sustained, an administrative judge will review an agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. *See Douglas v. Veterans Administration,* 5 M.S.P.R. 280, 306 (1981). The most significant factors in this case are the seriousness of the appellant's misconduct, her length of service, her past disciplinary and work records, the clarity of the notice she received regarding any rules she violated in committing the offense, and her potential for rehabilitation.

I find that the appellant engaged in serious misconduct. In this connection, I note that the appellant failed to properly obtain competition for

the transactions at issue. These transactions totaled more than 18 million dollars. In the agency's decision letter, Maria M. Ramini Ramirez, the agency's Deputy Regional Administrator for the Federal Acquisitions Service (FAS) in Region 9 and the deciding official in this appeal, cited with approval the following findings from my first initial decision in this case:

> The essence of transparency in government contracting must be the presence of genuine competition. I find the absence of competition, particularly for large awards, would severely undermine the integrity of the government's contracting processes.

See RAF, Agency File, Tab 4s. I find Ms. Ramirez correctly relied upon my findings in the context of her penalty determination. The appellant's misconduct eroded the integrity of the government's contracting program, and goes to the core of her duties as a contractor. Although the appellant argues in her closing brief that she found SMF's pricing "fair and reasonable," and that, consequently, she "saved millions," I find her assertion speculative and unpersuasive. *See* RAF, Tab 33 (Appellant's Closing Brief, at 12-26). In the absence of real competition, I have no way of knowing whether the pricing she obtained was fair and reasonable.

The appellant had approximately 23 years of service with the agency at the time of her removal,

and 29 years of federal service. *See* RAF, Tab 1. Further, the record indicates her performance was, at least, satisfactory during the course of her career. *Id.*

As to the notice the appellant received regarding the agencies rules on the competitive requirements for orders exceeding 3 million dollars, I find she had notice of those requirements but chose not to follow them. In her voluminous closing brief, she goes on at length about the different requirements of various contracts within the agency. Nevertheless, I have already considered and rejected these arguments. As I stated in my first decision, I find it inherently implausible that the agency would have two sets of contracts with glaring differences between them such as the sole-source limitation at issue. *See Hillen v. Department of the Army,* 35 M.S.P.R. 453, at 458 (the inherent improbability of a witness's testimony is one factor an Administrative Judge may use to evaluate a witness's testimony). Nothing in the appellant's brief has changed my opinion regarding this issue. In any event, because the Board affirmed my findings in its decision, I am precluded under the law of the case doctrine from reconsidering the matter. I am bound by the Board's findings. *See McCarty v. Environmental Protection Agency,* 108 M.S.P.R. 45, 9 (2008). Further, to the extent the appellant still claims she had no knowledge of the sole source limitation with regard to orders over 3 million dollars, I find her claim inherently improbable. *See Hillen,* 35 M.S.P.R. at 58. Therefore, I find the agency provided the appellant with abundant notice regarding the competition requirements, but that she ignored those

requirements when she issued the delivery orders at issue in this appeal.

In the appellant's closing brief, she argues the agency violated her due process right as set forth in *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1376 (Fed. Cir. 1999). In essence, the appellant has slightly modified the argument she initially made regarding the agency's first penalty determination in this appeal. In my first initial decision, I rejected this argument. *See* AF, Tab 3 (March 15, 2007 Initial Decision, at 32-34 n.4). In its new incarnation, I still find this argument unpersuasive. Indeed, at this juncture of the appeal, the issues have been refined exclusively to the agency's penalty. The crux of the appellant's *Stone* argument is, again, that Mary Parks somehow gave Ms. Ramirez damaging information regarding the appellant. *See* RAF, Tab 33 (Appellant's Closing Brief, at 61-64). Even assuming the appellant is correct, however, I find Ms. Ramirez did not rely on any of this information in her decision. Further, in light of my finding that the appellant knew of the 3 million dollar limitation for self-marketed, sole source contracts, but ignored those requirements, I fail to see how anything Ms. Parks might have said to Ms. Ramirez would have made a difference in her decision.

In addition, as I stated in my first initial decision, the appellant's testimony at the merits hearing in this appeal was inconsistent with statements she had made to the agency's Inspector General and other agency management officials prior to filing her appeal. *See* AF, Tab 3 (March 15,

2007 Initial Decision, at 24 n.4). Because the appellant was not forthcoming regarding what transpired during the transactions at issue in this appeal, I find she is a poor candidate for rehabilitation.

As stated above, my discretion is limited under these circumstances. The appellant's misconduct is serious. Her behavior indicates a need for serious discipline. Such misconduct seriously undermines the degree of confidence the agency could place in her. Therefore, I conclude that the agency's removal action is well within the bounds of reasonableness.[1]

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[1] During the processing of this appeal, the appellant filed a motion to strike the admission of several agency declarations into the record on the basis that those submissions were to be filed so that they were received on June 9, 2008. *See* RAF, Tab 31. The appellant argues that because she did not receive the agency's filing until June 10, I should strike these declarations as untimely. The appellant's motion is DENIED. I required the parties to file their declarations so that I would receive them on June 9, 2008, not that the parties would receive them at that time. The record shows that, although the agency's submission was date-stamped at 9:29 A.M. on June 10, 2008, the agency actually transmitted it by facsimile on June 9, 2008, at 4:35 P.M. *See* RAF, Tab 30. The parties also filed various motions and cross motions against one another and requested that I impose sanctions for the alleged misrepresentations and distortions of the record that had allegedly been made during the course of the litigation. I find, however, that neither party engaged in any conduct that exceeds the boundaries of zealous advocacy that is expected under these circumstances. Therefore, the parties' motions are DENIED.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD:

/s/_____
Jeremiah Cassidy
Regional Director

NOTICE TO APPELLANT

This initial decision will become final on **December 8, 2008,** unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. You must establish the date on hich you received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and only be accomplished at the Board's e-Appeal website (http//e-appeal.mspb.gov).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you claim that you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury *(see* 5 C.F.R. part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the

postmark date. The date of filing by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website,

www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

Appellant

U.S. Mail — Velma Y. Lock
35648 Terrace Drive
Fremont, CA 94536

Appellant Representative

U.S. Mail — Frederick P. Hink, Esq.
29707 Janets Way
Easton, MD 21601

U.S. Mail — Renn C. Fowler, Esq.
1 Grove Street
Belfast, ME 04915

Agency Representative

U.S. Mail

Deborah Finch, Esq.
General Services Administration
GSA Office of Regional Counsel
(9L)
450 Golden Gate Avenue
Fifth Floor West
San Francisco, CA 94102-3434

November 3, 2008
(Date)

/s/
Cynthia L. Bosten
Paralegal Specialist

[ENTERED: NOVEMBER 9, 2007]

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2007 MSPB 264

Docket No. SF-0752-04-0183-I-6

Velma Y. Lock,

Appellant,

v.

General Services Administration,

Agency.

November 9, 2007

Renn C. Fowler, Esquire, Belfast, Maine, for the appellant.

Deborah Finch, Esquire, San Francisco, California, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review, and the agency has filed a cross petition for review, of an initial decision that sustained two of the six specifications supporting the charge brought by the agency and remanded the appeal to the agency for further consideration of its penalty determination. For the reasons set forth below, we DENY the petition and cross petition, REOPEN the appeal on our own motion pursuant to 5 U.S.C. § 1201.118, and AFFIRM the initial decision AS MODIFIED by this Opinion and Order, still REMANDING the appeal to the agency for further consideration of its penalty determination.

BACKGROUND

¶2 The appellant appealed the agency's decision to remove her from the position of Technology Project Advisor, GS-12, in the agency's Technical Services Division, based on a charge of improper contracting transactions. First Initial Appeal File (IAF-1), Vol. 1, Tab 1. After holding the hearing requested by the appellant, *see* IAF-1, Vol. 1, Tab 1 at 4, the administrative judge sustained two of the six specifications supporting the charge and found unproven the appellant's affirmative defense, Sixth Initial Appeal File, Tab 3. In light of the particular circumstances of this appeal, the administrative judge remanded the case to the agency so that "it can reevaluate the appropriateness of the penalty by considering only the specification[s] that [the administrative judge] sustained." *Id.* at 35.

¶3 On petition for review, the appellant argues, *inter alia*, that the administrative judge erred in his management of the "rebuttal" hearing and by finding that: (1) The agency had proven two of the six specifications; (2) disciplining her promoted the efficiency of the service; and (3) the agency had not violated her due process rights. Petition for Review File (PFRF), Tab 1. The agency has responded in opposition to the appellant's petition for review and has filed a cross petition for review, arguing that it proved all six specifications supporting the charge against the appellant. PFRF, Tab 4. The appellant has responded in opposition to the agency's cross petition for review.* PFRF, Tab 6. Neither party has contested the administrative judge's decision to remand the case to the agency for a new penalty determination.

ANALYSIS

¶4 We grant petitions such as the ones filed by the appellant and the agency only when significant new evidence is presented to us that was not available for consideration earlier or when the

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* After the close of the record on review, the appellant filed a motion to reopen the appeal, dated August 18, 2007, in order to submit additional evidence and argument gleaned from the agency's July 12, 2007 response to her July 2, 2007 request for documents under the Freedom of Information Act. Because the appellant has not shown that the evidence accompanying her motion is of such weight as to warrant a different outcome in this case, the appellant's motion is DENIED. *See Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980); *cf. Parkinson v. U.S. Postal Service*, 58 M.S.P.R. 393 (1993) ("The Board has authority to reopen an appeal on its own motion in the interests of justice, particularly when the evidence is of such weight as to warrant a different outcome."), *aff'd*, 31 F.3d 1177 (Fed. Cir. 1994) (Table).

administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

¶5 After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. *See id.* We therefore DENY the petition for review and the cross petition for review. We nonetheless REOPEN the appeal to modify the remand order language. *See* 5 C.F.R. § 1201.118.

ORDER

¶6 Accordingly, we REMAND this appeal to the agency to select an appropriate penalty in light of the misconduct sustained in the initial decision. The agency must complete its proceedings and issue a new decision within 60 days of the date of this Order. Upon issuance of that decision, if the appellant is dissatisfied, she may file an appeal with the Board's Western Regional Office and, if she so desires, exercise her right to a hearing as to the reasonableness of the newly-imposed penalty, prior to the issuance of a new initial decision addressing solely that issue. The Board therefore dismisses this appeal without prejudice to the appellant's right to file an appeal within 30 days of the date of the agency's new penalty determination. Because this decision does not finally decide the penalty issue, the appellant's rights to petition for review of that issue and to seek review of the agency's action in the U.S.

Court of Appeals for the Federal Circuit will accrue in connection with the decision now to be issued by the agency, following the administrative judge's action on any renewed appeal that she may bring.

FOR THE BOARD:

_____

William D. Spencer
Clerk of the Board
Washington, D.C.

[ENTERED: MARCH 15, 2007]

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
OFFICE OF REGIONAL OPERATIONS

VELMA Y. LOCK,
Appellant,

DOCKET NUMBER
SF-0752-04-0183-I-6

v.

GENERAL SERVICES ADMINISTRATION,
Agency.

DATE: March 15, 2007

Renn C. Fowler, Esquire, Belfast, Maine, and Fredrick P. Hink, Esquire, Easton, Maryland, for the appellant.

Deborah Finch, and Jonathan R. Celniker, Esquire, San Francisco, California, for the agency.

BEFORE

Jeremiah Cassidy
Administrative Judge

INITIAL DECISION

INTRODUCTION

On December 19, 2003, the agency removed the appellant from employment as a GS-12 Technology Project Advisor with the agency's

Federal Technology Service (FTS) in San Francisco, California, based on improper contracting transactions. *See Lock v. General Services Administration*, MSPB Docket No. SF-0752-04-0183-I-1 (Lock 1), Agency File, Tabs 4A & 4B. The appellant timely appealed the agency's action to the Board.[2] *See* Lock 1, Appeal File (AF), Tab 1. The Board has jurisdiction over this appeal. *See* 5 U.S.C.A. §§ 7701(a), 7511(a)(1)(A), 7512, and 7513(d) (West 1996); 5 C.F.R. §§ 752.401(a), .401(c), and .405(a) (2006). I held a hearing on December 7-9, 2005, and July 6-7, 2006, in San Francisco, California.

For the reasons set forth below, the agency's action is REVERSED in part, SUSTAINED in part, and REMANDED to the agency for further consideration of the penalty.

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[2] The appellant initially filed this appeal on January 10, 2004. *See* Lock 1, AF, Tab 1. After that initial filing, the appeal was reassigned to a second Administrative Judge on November 15, 2004. *See Lock* v. *General Services Administration*, MSPB Docket No. SF-0752-04-0183-I-2 (Lock 2), AF, Tab 5. On July 25, 2005, the Chief Administrative Judge (CAJ) of the Board's Western Regional Office reassigned the appeal to me. *See Lock* v. *General Services Administration*, MSPB Docket No. SF-0752-04-0183-I-3 (Lock 3), AF, Tab 3. Since that time, I have dismissed the appeal without prejudice to its refiling on more than one occasion to accommodate the parties schedules in this appeal due to the large number of submissions and the complexity of the issues involved. Throughout my decision, whenever I have referred to a document, I have used a record citation that indicates which of the refiled appeal files contains that particular document. For example, I refer to the "I-5" refiled appeal as "Lock 5," and the "I-4" refiled appeal as "Lock 4," etc.

ANALYSIS AND FINDINGS

Burden of Proof

To justify its discipline of the appellant, the agency must prove its charge by a preponderance of the evidence. *Diaz v. Department of the Army*, 56 M.S.P.R. 415, 417 (1993); *Smith v. United States Postal Service*, 55 M.S.P.R. 348, 356 (1992). A preponderance of the evidence is the "degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than not true." 5 C.F.R. § 1201.56(c)(2) (2006).

Background

Prior to her demotion to the position of Project Technology Advisor on August 24, 2003, the appellant was employed as a GS-13 Information Technology Specialist with the agency's Technical Services Division, Federal Technology Service (FTS).[3] *See Lock v. General Services Administration*, MSPB Docket No. SF-0752-03-0567-I-1, Agency File, Tabs 4b & 4c. While she was in this position as an Information Technology Specialist, she was the agency's Contracting Officer for a July 10, 2000 delivery order, and a February 14, 2001 modification

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[3] The appellant also filed an appeal regarding her demotion. The Administrative Judge, however, dismissed that appeal without prejudice to its subsequent refiling by the appellant following the issuance of the Board's final decision on the removal action. *See Lock* v. *General Services Administration*, MSPB Docket No. SF-0752-03-0567-I-1 AF, Tab 17.

of that initial order, for the Department of Health & Human Services. She issued these orders from a contract between the SMF Systems Corporation (SMF) and the agency.

Effective March 18, 1997, SMF, the agency, and the Small Business Administration (SBA), had entered into an agency Federal Acquisition Service for Technology (FAST) Contract, a firm-fixed price, indefinite delivery, indefinite quantity (IDIQ) contract. Pursuant to the contract's scope of work, and through the issuance of task orders, SMF, as well as other vendors who successfully bid on the contract, provided a broad range of high-quality, non-complex information technology services to the agency and its client agencies. *See* Lock 1, Agency File, Tab 4e. The initial delivery order the appellant issued against the FAST Contract called for SMF to provide HHS with 30,000 seats of Tivoli software. The February 14, 2001 modification called for SMF to provide 65,000 seats of "Risk Manager" and "Policy Director" software.

By letter dated February 7, 2002, Marc Weisman, HHS's Director of the Office of Acquisition Management, notified the appellant that HHS no longer had a need for the "Risk Manager" and "Policy Director" software applications, and would immediately return any copies of that software. *See* Lock 1, Agency File, Tab 4i. Mr. Weisman further stated HHS wished to reduce the "number of previously negotiated seats from 30,000, to 17,000." *Id.*

In a February 6, 2002 letter, Scott Woehr, an attorney for the Government Leasing Corporation (GLC), stated GLC had teamed with SMF "to lease a Tivoli enterprise software solution to HHS." *See* Lock 1, Appellant's Exhibit A (at 95-96). Mr. Woehr further stated written certifications from HHS and the agency confirmed that the Tivoli software was essential to the daily operations of HHS and integral to the HHS Enterprise Infrastructure Management System. He stated GLC paid Tivoli in full for a 30,000 seat enterprise license of Tivoli Framework, and 65,000 seats of Tivoli Risk Manager, and 65,000 seats of Tivoli Policy Manager. He stated these payments to Tivoli were made based upon the representations and warranties contained in the HHS and GSA essential use certificates, the essential use questionnaire completed by HHS, the DD250 acceptance certificates signed by HHS, and Delivery Order No. T0900BH1449, as amended, including attachment A, Software License Plan and Leasing Terms and Conditions.

In the letter, Mr. Woehr stated he had learned HHS had asked the agency about the potential consequences of a partial return of some of the Tivoli software, or a partial non-payment for some of the software HHS had yet to receive. *See* Lock 1, Appellant's Exhibit A (at 95-96). He stated that unless HHS had a "non-appropriation," any non-payment would be a termination for convenience of the order and Tivoli license requiring immediate payment of the remaining lease payments discounted at 8 percent per annum. He stated that at a recent meeting attended by Brian Burns, the Chief Information Officer (CIO) of HHS, Mr. Burns

had indicated HHS "had the money for the Tivoli software." Mr. Woehr stated, therefore, HHS's decision not to pay for the software was not a "non-appropriation" under the agreement between the parties. In this connection, he stated there was no unilateral right to partially terminate some of the Tivoli licenses or partially return some of the Tivoli seats. He further stated the parties' agreement involved an enterprise license, not an individual use license. He added HHS received "a very favorable pricing" for the enterprise license and enjoyed its benefits for two years. Mr. Woehr argued the parties' agreement required that HHS pay the third installment payment of $7,450,000 to GLC's assignee by February 10, 2002. In the absence of either that payment or an agreement to restructure the payments due, Mr. Woehr stated HHS and the agency would be in default of the order, and that default would constitute a constructive termination for convenience of all the Tivoli software requiring immediate payment of the remaining payments in the amount of $13,494,441.15.

By letter dated March 12, 2002, Ruby Caffrey, President of SMF, submitted notification of default and a claim against the agency for $9,533,935, plus interests and costs. *See* Lock 1, Agency File, Tab 4h. Ms. Caffrey further stated the government's use of all software and services under the contract must immediately cease and all goods must be returned. She stated that under the delivery order, the government was required to make a payment of $7,450,000 by February 10, 2002 for the software, licenses, materials, and services described in the delivery order. She stated that on February 28, 2002,

the government made a payment of $4,350,00, leaving a balance of $3,100,000. Having failed to make the complete payment, she asserted the government was in default on the delivery order, which had the effect of revoking any existing software license rights. She argued a further payment of $6,433,935 was immediately payable because the breach had accelerated all outstanding obligations under the contract.

In an August 19, 2002 Final Decision, Janet Lourenzo, an agency Contracting Officer, denied SMF's claim against the agency. *See* Lock 1, Agency File, Tab 4g. Ms. Lourenzo stated the evidence of record did not show the delivery order created a binding enforceable agreement between the agency and SMF. In this connection, she stated the scope of the underlying contract between the agency and SMF encompassed "non-complex integration services under Standard Industrial code [SIC] 7373" for client agencies. She stated that the delivery orders at issue, however, were not for systems design services, but, rather, for software licenses. She stated, therefore, the appellant had exceeded the contract's scope and her authority as the ordering official in attempting to use a services contract to procure a product.

Ms. Lourenzo further stated the appellant exceeded the scope of the contract due to the value of the software licenses acquired. *See* Lock 1, Agency File, Tab 4g. In this connection, she noted the contract set a limitation of $3,000,000 per order as the value of the services that can be acquired using the contract, but the combined value of the modified

delivery order was $18,201,705. She further noted that even if the original $8,667,770 order and the $9,553,935 modified order were viewed as independent delivery orders, both exceeded the contract's designated ceiling. Ms. Lourenzo concluded that in attempting to acquire products above that $3,000,000 ceiling, the appellant exceeded the contract's scope and her authority.

Ms. Lourenzo also stated the appellant lacked the authority to modify the terms of the contract because her authority was limited to that of a Certificate of Appointment for a basic level warrant. *See* Lock 1, Agency File, Tab 4g. Ms. Lourenzo stated only the Procuring Contracting Officer (PCO) had the authority to alter the contract's scope, terms, or conditions.

In addition, Ms. Lourenzo stated HHS did not have the requisite funding for either the original or the modified orders. *See* Lock 1, Agency File, Tab 4g. She stated although HHS might have had a need for the Tivoli software, it did not have funds identified for the software, nor did it obligate sufficient funds for these acquisitions at the time the orders were placed. Moreover, she stated the convenience termination provision set forth in the HHS leasing documents, which provided for payment of remaining lease installments, less eight percent, created an Anti-Deficiency Act violation. She concluded, therefore, the appellant had no authority to enter into an arrangement that violated the law.

Nevertheless, Ms. Lourenzo stated the agency had no financial liability under the contract's terms

and conditions. *See* Lock 1, Agency File, Tab 4g. She stated the contract explicitly conditioned the agency's obligation to make software license payments on the availability of appropriated funds from which payment could be made. She stated SMF understood the agency would be relying on HHS appropriated funds to make the license payments. She further stated that because HHS had not provided the agency with the appropriated funds to pay for the Risk Manager and Policy Director software, the agency had no contractual liability pursuant to the contract with respect to the $9,553,935 claim.

SMF appealed the Contracting Officer's Final Decision to the Board of Contract Appeals. *See* Agency File, Tab 4e. The agency and SMF then filed "a stipulation of award," and settled the appeal. Pursuant to that agreement, the parties agreed that $9,023,437.50 would be paid to SMF's assignee, the Citizen's Leasing Corporation, out of the Permanent Indefinite Judgment Fund as full payment of SMF's claim and all related matters. *Id.*

In the agency's notice of proposed removal, Maria M. Jamini-Ramirez, the Deputy Assistant Regional Administrator for the FTS and the proposing official in this appeal, stated the following:

> The Assistant Regional Administrator has tasked me with reviewing your conduct in connection with a July 18, 2000 delivery order and a February 14, 2001 modification on that delivery order placed against Contract No.

GS00K97AFD2187 between GSA and SMF Corporation. Additionally, I was tasked with serving as the Proposing Official in the event that adverse action is recommended. For the reasons specified below, I propose that you be removed from employment with [the agency] for improper contracting transactions.

On July 18, 2000, you issued a delivery order against the contract between GSA and SMF Corporation for 30,000 seats of IBM's Tivoli-brand software, to be shipped to the Department of Health & Human Services. The delivery order stated that [the agency] would make payments to SMF as follows, for a total of $8,667,700.

July 10, 2000	$1,217,700
July 10, 2001	$3,100,000
February 10, 2002	$4.350,000
	$8,667,700

Your authority as a contracting officer was restricted to awarding contracts for no more than $25,000, or placing orders against existing contracts in any amount but only in accordance with their terms and conditions. GSA's

contract with SMF covered only integrated information technology services and the hardware and software incidental to the performance of those services. Your use of this contract to acquire 30,000 seats of. software with no associated integrated information technology services was not in accordance with the contract's terms and conditions, and therefore was beyond your warrant authority.

In a May 17, 2000 e-mail message, HHS told you they wanted [the agency] to acquire the Tivoli software without any HHS participation or obligation, and for [the agency] to then make the software available to HHS in a way that permitted HHS to "pay as we go and return the product to [the agency] when our need is finished." In a July 10, 2000 letter, HHS had informed you that they had only approximately $1,230,000 available for the Tivoli software ($1,217,700 plus [the agency's] one-percent fee), and could not obligate funds exceeding that amount without violating the Anti-Deficiency Act. You placed the SMF delivery order in the amount of $8,667,700. You did not have any commitment from HHS for the $7,437,000 difference between the amount HHS had available and the amount of the order (that is, the difference between the $1,230,00

available and the $8,667,000 order amount).

You recited in the delivery order that the government's obligations were contingent on the availability of appropriated funds. However, you incorporated into the' delivery order a three-year Installment License Plan (ILP), which purported to supersede any conflicting terms and conditions contained in the contract or the delivery order.

The ILP made the representation that the government intended to fulfill the full three year term, and that the government believed funding could be obtained for all payments over the lease term. As noted above, HHS had told you that they did not have such funds available, and that they were unwilling to commit to continuing the use of the Tivoli software or to making any payments beyond the initial $1,217,700 plus [the agency's] 1% fee.

The ILP also provided that in the event the license agreement was terminated for the government's convenience, SMF would still be paid for the full three years (less 8% per annum). As noted above, HHS had informed you that they were unwilling to commit to using the software for a three-year term. In the

May 17, 2000 e-mail message, and again in their July 10, 2000 letter, HHS told you that they would not agree to a required payment in the event of termination for convenience.

By directing to SMF a software-only procurement which was beyond the scope of the integrated information technology services contract for which SMF had competed, you also circumvented competition requirements. Moreover, orders in excess of $3,000,000 (calculated with the price of options included) are required to be competed among eligible contract holders. Accordingly, even if an order for 30,000 seats of software had been within the scope of SMF's contract with [the agency], your $8,667,700 order would still have constituted an unauthorized sole-source procurement.

On February 14, 2001, you modified the July 18, 2000 SMF delivery order to 65,000 seats each of Tivoli "Risk Manager" and "Policy Director" software for HHS. The modified delivery order stated that [the agency] would make additional payments to SMF totaling $9,533,935, as follows:

February 10, 2002 $3,100,000

December 1,2002 $6,433,935

$9,533,935

Your warrant restricted you to awarding contracts for no more than $25,000, or placing orders against existing contracts in any amount but only in accordance with their terms and conditions. Your use of the GSA-SMF integrated information technology services contract to acquire 65,000 seats of software alone was not in accordance with the contract's terms and conditions, and therefore you again exceeded your authority as a contracting officer.

You again circumvented competition requirements by directing to SMF a procurement which was beyond the scope of SMF's contract, and by failing to afford eligible contractors the opportunity to compete as required for procurements exceeding $3,000,000.

You had no commitment from HHS for any portion of the $9,533,935 cost for the new software.

On February 7, 2002, three days before [the agency] was to make the first payment to SMF under your February

> 14, 2001 modified delivery, HHS advised you that they no longer wanted the "Risk Manager" and "Policy Director" software which had been delivered almost a year earlier. Your placement of the February 14, 2001 order without HHS's commitment to fund the acquisition left [the agency] with a claim from SMF for $9,533,935.

See Lock 1, Agency File, Tab 4f.

In the appellant's reply to the notice of proposed removal, she argued she acted within the scope of her authority as a Contracting Officer during all of the transactions that occurred regarding HHS's purchase of the Tivoli software. *See* Lock 1, Agency File, at Tab 4c. In this connection, she argued the delivery order, and its February 14, 2001 modification, were within the scope of the agency's contract with SMF. She argued that contract allowed for the purchase of software, not only software that was incidental to associated integrated services. She argued further the intent of the agency's FAST contract with SMF was to allow for the acquisition of Multiple Award Schedule items, but that the prices for hardware and software listed in the Multiple Award Schedule would operate as "ceiling prices" under the FAST contracts. She also argued the agency had a pattern and practice of ordering software against the FAST contracts. As to this pattern and practice, she alleged agency managers knew client agencies were making purchases of software under the FAST contract with

SMF and other vendors, and that management had approved and authorized those purchases.

Further, the appellant contended the July 12, 2000 delivery order, and modification were consistent with the commitment HHS had made. See Lock 1, Agency File, Tab 4c. She alleged HHS informed her on or about July 10, 2000 that it had approximately only $1,230,000 in funds available and "could not obligate itself to ... anything in excess of that" sum. Nevertheless, because HHS's requirement for Tivoli software required an $8,667,700 purchase, she alleged she structured the delivery orders in such a way that HHS had two options, both of which were contingent upon the availability of funds. She alleged the delivery order required the following payments from HHS: $1,217,700, on July 10, 2000; $3,1000,000, on July 10, 2001; and $4,350,000 on February 10, 2002. In addition, she alleged the February 14, 2001 modification to delivery order T0900BH1449 added 65,000 seats, revised the payment schedule, and made clear that all other terms and conditions remained in effect. She contended that "[a]ny long-term requirements are done in this way, since a contracting officer cannot commit next year's funds in advance of an appropriation."

The appellant also argued she met the contract's competitive requirements. *See* Agency File, Tab 4c. In this regard, she argued that nothing in SMF's contract precluded her from issuing delivery orders in excess of $3,000,000. She contended the contract specifically allows non-competitive, sole-source orders to a vendor over

$3,000,000 when those orders are awarded as the result of self-marketing by the vendor to the client agency. She alleged HHS officials advised her they had considered alternative software, but had concluded only Tivoli software would meet HHS's needs. She argued, therefore, the procurement did not violate competitive requirements because there is nothing "illegal about a sole source" and SMF's FAST 8(a) contract allowed sole-source for self-marketed.requirements.

In addition, the appellant argued HHS submitted a Letter of Essential Needs regarding the initial 30,000 seats. *See* Lock 1, Agency File, Tab 4c. She alleged HHS issued that letter following a competitive analysis indicating their requirement for Tivoli software would best be met though an Installment License Plan (ILP). As to the 65,000 seats, she alleged she executed a Letter of Essential Needs based on input she received from HHS. Moreover, she alleged that, in response to a standard agency questionnaire, HHS stated only SMF Tivoli software "would meet its needs."

With respect to the self-marketing issue, the appellant alleged she learned of HHS's requirements from HHS and SMF. *See* Lock 1, Agency File, Tab 4c. She argued, therefore, the July 10, 2000 delivery order and its February 14, 2001 modification "fell under the contract's self-marketing exception for sole-source contracts."

Consequently, she argued the agency could not impose discipline on her because she had not engaged in any misconduct. *See* Lock 1, Agency File,

Tab 4c. She argued that, at most, the evidence provided by the agency to support its action showed that the agency's contracts are "vague and ambiguous." Further, she argued that because she cleared the acquisitions with agency management, including John Powell,[4] a senior FTS Manager and her first-line supervisor, the agency, in effect, ratified her actions. Finally, she contended the agency "mishandled" the claim SMF had filed following HHS's decision not to accept the 2002 delivery order by misinterpreting the underlying contract and issuing a flawed decision on the claim.

In the agency's December 17, 2003 decision letter, Ann Gladys, FTS's Assistant Regional Administrator for the Pacific Rim Region, informed the appellant that all of the charges were sustained, and that she would be removed from service effective December 19, 2003. *See* Agency File, Tab 4b. In support of the agency's decision, Ms. Gladys stated the appellant had exceeded her warrant authority because the delivery orders she issued were based on a contract for integrated information-technology services, including software incidental to those

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[4] On December 12, 2004, the agency demoted Mr. Powell from his position as a GM-0301-15 Business Manager, to a position as a GS-0343-13 Program Analyst, based on his execution of a February 15, 2001 document that modified the interagency agreement between the agency and HHS and facilitated the modification of the initial delivery order at issue in this appeal. Mr. Powell subsequently appealed that action to the Board, and the Administrative Judge issued an initial decision reversing the agency's action. *See Powell v. General Services Administration*, MSPB Docket No. SF-0752-05-0198-I-1 (Initial Decision, Mar. 28, 2005). That decision became final after the Board denied the agency's petition for review of the initial decision by short-form order on December 2, 2005.

services. Ms. Gladys further stated that while software might be available under the contract, that software must be necessary to "Computer Integrated Systems Design."

Ms. Gladys also rejected the appellant's argument that it was a common practice to order software from the SMF 8(a) FAST Contract. *See* Agency File, Tab 4b. Ms. Gladys stated the appellant had failed to provide any evidence to show this was a "common" practice. Ms. Gladys further found that although some agency managers, including the appellant's Division Director, might have approved and/or authorized the delivery orders, the appellant, as the Contracting Officer for these transactions, had the ultimate responsibility to ensure compliance with contracting requirements, to protect the government's interests, and to act within the scope of both her warrant and the contract, regardless of the involvement of other agency employees.

As to the commitment issue, Ms. Gladys stated that because HHS had committed only $1,217,700 for the first delivery order, and no funds at all for the February 7, 2001 modification of the original order, she should not have issued the delivery orders. See Agency File, Tab 4b. Notwithstanding the appellant's assertions to the contrary, Ms. Gladys stated HHS had never committed to purchasing the software, even if funds were available. Finally, she agreed with Ms. Jamini-Ramierez that the appellant's delivery orders had exceeded the $3,000,000 threshold for non-

competitive awards, regardless of whether SMF had self-marketed the Tivoli-software to HHS.

During the processing of this appeal, the second Administrative Judge assigned to the appeal issued an order that sought to clarify and refine the misconduct issues discussed in the agency's proposal and decision letters. *See* Lock 2, AF, Tab 11. He found the agency had charged the appellant with "Improper Contracting Transactions." He further found there were six specifications under the charge, three relating to the July 18, 2000 order, and three relating to the February 14, 2001 modification of that order. With regard to each of the two orders, he stated he interpreted the specifications as follows: 1) Taking actions not in accordance with the terms or conditions of the applicable contract and that were beyond the appellant's authority; 2) placing the orders without a commitment from DHHS to pay the full amount; and 3) circumventing competition requirements. *Id.* The parties essentially agreed with the Administrative Judge's characterization of the charge and its underlying specifications, with only minor caveats. *See* Lock 2, AF, Tabs 12 & 13. I have, therefore, adhered to the Administrative Judge's formulation of the charge in adjudicating the appeal. *See Taylor v. Department of the Air Force*, 80 M.S.P.R. 450, ¶15 (1998).

The agency established the appellant engaged in improper contracting, transactions.

1. The agency failed to establish the appellant issued delivery orders that were not within the scope of the contract.

A. Initial Delivery Order for 30,000 Seats.

The crux of this specification is that the appellant's orders exceeded the scope of the contract because her orders were only for the delivery of computer software. *See* Lock 2, Tabs 11, 12 & 13. The agency argues SMF's contract with the agency was a services contract that allowed SMF to provide only software incidental to the services requested pursuant to the contract.

Thomas K. Caffrey testified he and his wife were the owners of SMF. *See* December 2005 Hearing Transcript (HT1), Vol. 2, at 214. He testified his wife handled accounting and finance, while he was responsible for sales, negotiations, field operations, and contract management.

Mr. Caffrey testified the "seats" he provided to HHS were not merely computer disks. He testified, rather, that a seat is actually an individual workstation that cannot be shipped by a vendor to a client. He testified the 30,000 seats that were part of the original delivery order constituted access to Tivoli Network Architecture Software. *See* HT1, Vol. 2, at 215-216. With respect to the services provided, he testified as follows:

> What we supply - what they basically received was one master cd, if you want to call it, or diskette, or we call it Golden Rod diskette; one master diskette that allows the use of 30,000 seat access to that. Then our responsibility, both ourselves as well

> as Tivoly [sic], was to do the implementation, installation, and design, which would mean that we would have to go to the servers, provide the software - load the software in the servers, integrate the servers to every single workstation to insure [sic] access and things of that nature. So there's a combination of providing that product with the associated integration.

See id. at 216.

Mr. Caffrey testified the purpose of the Tivoli Enterprise Software was to manage the network of a large organization. *See* HT1, Vol. 2 at 217. For example, he testified the Tivoli software allowed HHS, and its sub-units, to upgrade Microsoft software without needing to go to each individual workstation. He testified the Tivoli software allowed the agency to "get onto ... a single system and download that accordingly to whoever [sic] should have it or not have it, and what access they should have." *See id.* at 218. He explained that if HHS needed to back up its system, but did not want any end-users to go off the system during that back-up, the Tivoli software allowed HHS to back the system up while it was still in use.

Mr. Caffrey testified SMF's Statement of Work (SOW) that he drafted with Mr. Burns, HHS's CIO, provided that SMF would implement an Enterprise Infrastructure Management (EIM) Framework for HHS. *See* HT1, Vol. 2, at 225; Lock 1,

Appellant's Exhibit A (at 1). He testified the EIM is a network architecture management framework the software performs. He testified SMF had agreed to provide a "turnkey solution" to HHS. In this connection, he testified the "turnkey solution" required the "entire installation and implementation" of the software for HHS. *See* HT1, Vol. 2, at 227. He further testified HHS purchased a "bundle package of software and services, and our responsibility was to - to provide the software, and also to provide the manpower to insure [sic] that it got implemented." *See id.* at 227-228. He also testified that, initially, Tivoli performed some of the services required under the first delivery order, but that SMF eventually replaced them with regard to most of these on-site services. *See id.* at 234-237. He testified the services SMF provided were set forth in the quote provided to HHS. *Id.* He testified all the "defined applications" delineated in that quote constituted services. *See id.* at 234-238; Lock 1, Appellant's Exhibit A (at 36). He testified the numbers cited in the quantity column of that quote represent the number of days that SMF would provide the given service, or "defined application." *Id.*

With respect to the logistics of providing the services required by the contract, Mr. Caffrey testified he had 8-12 employees on-site full-time providing these services, while Tivoli had approximately 6 employees on-site. *See* HT1, Vol. 2, at 240. He testified SMF worked "in conjunction" with Tivoli, which, at that time, was a division of the International Business Machines Corporation (IBM), and then SMF would eventually "take over and take

a bigger lead." *Id.* In addition, he testified Dan Greening, a Tivoli Sales Representative, stated SMF was one of the few, and perhaps the only, contractor that could provide the required services because only SMF's employees were both "Tivoli-certified" and had the requisite top secret security clearances necessary to perform the services under the contract. *See* HT1, at 280-282. He testified that to obtain Tivoli certification, an information technology professional needed approximately 12-18 months of training. *Id.*

As to the pricing of the services SMF provided to HHS, Mr. Caffrey testified SMF provided a "bundled" price quote that combined both services and the cost of the software. *See id.* at 241, & 307-308. He testified that with enterprise licenses, as opposed to individual licenses, the software industry typically provides bundled prices to potential clients that combine the costs of products and services. He testified that 20-25% of the original order's $7.4 million dollar price represented services, rather than the product itself. *See* July 2006 Hearing Transcript (HT2), Vol. 1, at 170-172. He testified SMF provided design services, and did not just "load software" for HHS. *See id.* at 204.

John E. Cornell, an Attorney with the agency's Office of General Counsel, testified his responsibilities are spread out among several different subdivisions of the agency, and he serves the Office of the Chief Acquisition Officer; the Office of the Chief Information Officer; the Office of Government Wide Policy; the Office of Electronic Government; and the Access Certificates for

Electronic Services. *See* HT2, Vol. 1, at 22-23. He testified that his primary responsibility in 1996 was as head of the Litigation Office that handled litigation for the Federal Supply Service (FSS), the Information Management Resources Service (IRMS), and the Federal Telephone Service. He testified he was also involved in the creation of the FAST program during that time period. *Id.*

With respect to the FAST program, Mr. Cornell testified the contracts under that program encompass SIC 7373 services. *See* HT2, Vol. 1, at 26-30. He testified SIC 7373 involves the provision of non-complex integration services. He explained these services require that a technician provide services that tie together computer hardware and software so they work together. In this connection, he testified that "just loading [software] onto a server somewhere" does not constitute a SIC 7373 service that comes within the ambit of the FAST contract SMF had with the agency.

To evaluate Mr. Caffrey's testimony that SMF provided integration services to HHS, I must make credibility determinations, and explain why his testimony is either credible or not credible. *See Hillen* v. *Department of the Army*, 35 M.S.P.R. 453, 458 (1987), *modified*, 54 M.S.P.R. 58 (1992), *rev'd and remanded on other grounds*, 21 F.3d 1572 (Fed. Cir. 1994). For several reasons, I find his testimony credible.

As the Vice-President of SMF, Mr. Caffrey would be in a position to know whether his company provided services, or not, to HHS. *See Hillen*, 35

M.S.P.R. at 458 (the witness's opportunity and capacity to observe the act or event in question is one factor an Administrative Judge may use to evaluate a witness's credibility). Further, he would be in a position to know what kind of services SMF provided. *Id.* Here, Mr. Caffrey testified SMF provided technical services to HHS that integrated the functioning of their computer hardware and software. He also testified he had employees on-site for an extensive amount of time performing these services.

In addition, Mr. Caffrey does not appear to have any significant bias that might lead me to discredit his testimony. Of course, the record shows he and the appellant have a professional relationship, and have worked on a number of contracts together. See *Hillen*, 35 M.S.P.R. at 458 (the witness's bias, or lack of bias, is one factor an Administrative Judge may use to evaluate a witness's credibility). But there is nothing here to suggest Mr. Caffrey would fabricate testimony suggesting SMF had employees on-site integrating enterprise software onto HHS's computer networks.

The agency's representatives cross-examined Mr. Caffrey extensively regarding the SMF quote that set forth the services he stated were part of the delivery order. *See* HT2, Vol. 1, at 167-192; Lock 1, Agency Exhibit A (at 36); Lock 1, Agency File, Tab 4h (at 17); and Lock 5, Tab 29 (Agency's July 2006 Hearing Exhibits 2, 3 & 4). Nevertheless, despite some discrepancies between SMF's HHS quote, and an earlier quote Tivoli had provided to HHS for essentially the same project, Mr. Caffrey consistently

asserted his employees were on-site providing integration services for HHS. I see no reason why I should find that testimony not credible based on Tivoli's quote, as opposed to SMF's quote. I find his testimony credible, therefore, because it was largely uncontradicted by any other evidence. *See Hillen,* 35 M.S.P.R. at 458 (the contradiction of the witness's version of events by other evidence or its consistency with other evidence is one factor an Administrative Judge may use to evaluate a witness's credibility). Indeed, in the absence of any contradictory testimony, I find that I am compelled to find his testimony credible because there is no reason to believe it is inherently improbable. For example, if an HHS employee, such as Mr. Burns, HHS's CIO, had testified about the services that SMF either did, or did not, provide, I might have reached a different conclusion or analyzed this specification differently. But the agency did not provide any testimony from a witness who might have had reason to know about what SMF actually did for HHS under this contract and the delivery orders the appellant issued from it.

In the agency's closing brief, the agency argues the record evidence shows either that SMF did not provide enough services to HHS, or the right kind of services, to justify the appellant's use of the instant contract for the delivery orders she issued. *See* Lock 6, Tab 2 (Agency's Closing Brief, at 1-10). Nevertheless, the agency's charge as set forth in the proposal letter states there were "no services" associated with the delivery order in question. *See* Lock 1, Agency File, Tab 4f. Regardless of whether she might have engaged in some other kind of actionable misconduct, however, it is well settled

that "[t]he Board may not impose discipline based on a charge that the agency could have brought, but did not." *Leaton v. Department of the Interior*, 65 M.S.P.R. 331, 338 (1994), *affd*, 64 F.3d 678 (Fed. Cir. 1995) (Table); *see Nazelrod v. Department of Justice*, 50 M.S.P.R. 456, 459 (1991), *affd*, 43 F.3d 663 (Fed. Cir. 1994); *see also Holderness v. Defense Commissary Agency*, 75 M.S.P.R. 401, 404 (1997) (the Board reviews an agency's adverse action solely on the grounds invoked by the agency and may not substitute what it considers to be a more adequate or proper basis). Therefore, I find the initial delivery order issued by the appellant required SMF to provide services as well as software. Consequently, I find the agency failed to establish by preponderant evidence that she issued delivery orders outside of the contract's scope. Accordingly, this portion of the agency's specification is NOT SUSTAINED.

B. February 14, 2001 Modification for 65,000 Seats of Risk Manager and Policy Director.

As to the 65,000 seats of the Risk Manager and Policy Director, Mr. Caffrey testified the quote in that delivery order was also a "bundled price" that included both the cost of the software and the services needed to integrate it into HHS's computer networks. *See* HT1, Vol. 2, at 241-253; Lock 1, Appellant's Exhibit A (at 63-100). He testified SMF provided extensive services, in conjunction with Tivoli, involving the implementation and design of the software for HHS.

Again, as I found with respect to the initial delivery order, the agency did not provide any

evidence to refute Mr. Caffrey's testimony. In the absence of any evidence to show the modification did not involve the provision of services, I find credible Mr. Caffrey's testimony that such services were provided in connection with the order. *See Hillen*, 35 M.S.P.R. at 458 (the contradiction of the witness's version of events by other evidence or its consistency with other evidence is one factor an Administrative Judge may use to evaluate a witness's credibility). Therefore, I find the agency failed to establish by preponderant evidence that the modified delivery order the appellant issued did not properly come within the ambit of the FAST contract because it did not require SMF to provide any services. Accordingly, the agency's first specification is NOT SUSTAINED.

2. The agency did not establish the appellant failed to obtain a commitment from HHS before she issued her issued delivery orders from the FAST contract.

A. Initial Delivery Order for 30,000 Seats.

With respect to this specification, the agency relies upon a May 17, 2000 e-mail from Cheryl Howe, an HHS Contract Officer, and a July 10, 2000 letter from Marc Weisman, the Director of the Office of Acquisition Management. *See* Lock 1, Agency File, Tabs 4n & 4o. As stated above, both of these messages from HHS indicate these officials did not want to obligate HHS to purchase the Tivoli software. *See supra* p.8; Lock 1, Agency File, Tab 4f. Rather, they wished to "pay as we go," and return the software when they were finished with it.

Mr. Caffrey testified, however, that he and Ms. Lock decided to structure the transaction as an ILP after Ms. Howe and Mr. Weisman sent these messages. *See* HT1, Vol. 2, at 255-269. Mr. Caffrey testified the quote he had provided to HHS was based on the assumption that HHS needed a certain quantity of goods and services, and that if HHS did not want to make a genuine obligation to that amount of goods and services, he would not have been able to provide them with the discount represented in the quote. *Id.* He testified he had given HHS a $4,000,000 discount due to the size of their order. He further testified the arrangement they seemed to be requesting was not possible when purchasing enterprise license software. Mr. Caffrey testified, therefore, he met with Mr. Burns, Ms. Howe, and Mr. Greening, the Tivoli representative, to discuss the financing of the transaction. *Id,* Mr. Caffrey testified he informed the HHS officials the 7.4 million dollar quote he had provided was not available "by the drink," but that Mr. Burns stated he did not have the available funds to make the entire purchase. Mr. Caffrey testified the meeting's participants then concluded the payments could be made in installments.

Mr. Caffrey testified he later attended a second meeting shortly before the order was issued in July 2000. *See* HT1, Vol. 2, at 255-269. He testified the participants at the meeting included Mr. Burns, Scott Woehr, the GLC attorney, and several HHS contacting attorneys. He testified that at that meeting, they agreed they would structure the transaction's financing as an ILP. He testified that under the ILP, HHS was not required to pay the

entire cost of the transaction at the time SMF began its performance of the contract. He testified, rather,. HHS would instead promise to seek financing in the "out years" to pay for the order. In this connection, he testified the ILP obligated HHS to seek appropriated funds from Congress to complete the ILP payments, but that, in the event they could not obtain that appropriation, HHS would not be liable to SMF for the unpaid money. In addition, Mr. Caffrey testified no HHS official ever indicated they were not committed to the ILP transaction.

To evaluate Mr. Caffrey's testimony that HHS had made a commitment to make the ILP payments with regard to the initial order, I must make credibility determinations, and explain why his testimony is either credible or not credible. *See Hillen,* 35 M.S.P.R. at 458. For several reasons, I find his testimony credible.

Mr. Caffrey testified he was involved in the negotiations with HHS officials that led to the ILP agreement. I find, therefore, he is in a position to know what transpired during those discussions. That he has such knowledge makes him a credible witness. *See Hillen*, 35 M.S.P.R. 458 (the witness's opportunity and capacity to observe the event or act in question is a factor an Administrative Judge may consider in evaluating a witness's credibility).

As I found above with respect to the agency's first specification, *see supra* p. 18, I find there is no reason to discount Mr. Caffrey's testimony due to any alleged bias on his part. *See Hillen*, 35 M.S.P.R. at 458 (the witness's bias, or lack of bias, is one

factor an Administrative Judge may use to evaluate a witness's credibility). Again, there is nothing here to suggest Mr. Caffrey would fabricate testimony suggesting HHS officials had committed to the ILP when, in fact, they had not.

Further, Mr. Caffrey's testimony is consistent with the other evidence of record. *See Hillen*, 35 M.S.P.R. at 458 (the contradiction of the witness's version of events by other evidence or its consistency with other evidence is one factor an Administrative Judge may use to evaluate a witness's credibility). For example, the ILP's terms are consistent with his testimony. *See* Lock 1, Appellant's Exhibit A (at 43-49). In addition, it is undisputed HHS completed the payments for the initial order, which indicates, at a minimum, at least some sort of commitment to the transaction. *See* HT2, Vol. 1, at 169. I find, therefore, Mr. Caffrey's testimony credible because it was uncontradicted by any other evidence.[5] In this

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[5] As the agency points out in its closing brief, the appellant's testimony was inconsistent in some ways with statements she had made to the agency's Inspector General and other agency management officials prior to filing her appeal. *See* Lock 6, AF, Tab 2 (Agency Closing Brief, at 10-25). Further, the inconsistent statements identified by the agency are also inconsistent with Mr. Caffrey's testimony. Nevertheless, I find Mr. Caffrey was far more familiar with the negotiations that led to this transaction than the appellant was. For example, he testified that although he answered the appellant's questions during the negotiation process, and she might have spoken on a few occasions with Mr. Weisman, she did not participate in the meetings that led to the formation of the ILP. *See* HT1, Vol. 2, at 315-317. Of course, this raises the issue of whether it was proper for the appellant to allow Mr. Caffrey so much latitude in these negotiations. The agency's proposal letter, however, never identified the appellant's implicit delegation of authority

connection, I find that neither Mr. Woehr nor any HHS official testified at the hearing, or offered any kind of contradictory evidence for the record in this appeal. Consequently, I find the agency failed to establish by preponderant evidence that the appellant should not have issued the initial delivery order because HHS had not made any commitment to the ILP at issue. Accordingly, this portion of the agency's second specification is NOT SUSTAINED.

B. February 14, 2001 Modification for 65,000 Seats of Risk Manager and Policy Director.

With respect to the subsequent modification of the initial order, the record contains several documents that indicate HHS had made a commitment to making the additional purchase. For example, the agency and HHS issued a modification to the interagency agreement adding 65,000 seats of Tivoli Risk Manager and Policy Director to the initial order. *See* Lock 1, Appellant's Exhibit A (at 65). That agreement was signed on the agency's behalf by Mr. Powell, and for HHS by Dennis P. Williams, HHS's Acting Assistant Director for Management and Budget.

As the agency correctly points out in its closing brief, the modification does not obligate any additional funds from HHS. *See* Lock 1, Appellant's Exhibit A (at 43-49). Nevertheless, the modification specifically references Order T0900BH1449, which includes the ILP. *Id.* As stated above, the ILP

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to Mr. Caffrey to negotiate the ILP as an instance of her misconduct, so I need not consider that matter. *See Crouse v. Department of the Treasury*, 75 M.S.P.R. 57, 63, (1997).

provided HHS was not required to pay the entire cost of the transaction at the time SMF began its performance of the contract. *See supra p.* 22. Instead, HHS would promise to seek financing through the appropriations process. The ILP obligated HHS to seek appropriated funds from Congress to complete the ILP payments, but, in the event that they could not obtain that appropriation, HHS would not be liable to SMF for the unpaid money. I see no reason to find, and the agency has produced no evidence to show, that financial arrangements of this kind are, on their face, improper, or that they are in any way unprecedented.

On March 6, 2001, HHS accepted delivery of the software, which was priced at $9,533,935. *See* Lock 1, Appellant's Exhibit A (at 73). In addition, by letter dated July 9, 2001, Ms. Howe notified the appellant HHS had paid $3,100,000 for that software, which represented the first "installment" payment. *See id.* at 80-81. These documents were uncontradicted by any other evidence. Further, Mr. Caffrey testified HHS was committed to this delivery order. *See* HT1, Vol. 2, at 265-270. I find his testimony credible because it is consistent with the documentary evidence of record. *See Hillen*, 35 M.S.P.R. at 458 (the consistency of a witness's version of events with other evidence is one factor an Administrative Judge may use to evaluate the witness's credibility).

Moreover, the agency did not provide any evidence to contradict the evidence showing a commitment by HHS. For example, none of the other

people apparently involved in the modification who might have contradicted Mr. Caffrey's testimony and the documentary evidence I have cited, such as Ms. Howe, Mr. Burns, or Mr. Williams testified at the hearing, or offered any kind of contradictory evidence for the record in this appeal. Consequently, I find the agency failed to establish by preponderant evidence the appellant should not have issued the modified delivery order because HHS had not made any commitment to the ILP at issue. Accordingly, the agency's second specification is NOT SUSTAINED.

3. The agency established the appellant's delivery orders exceeded the competitive requirements of the FAST contract.

A. Initial Delivery Order for 30,000 Seats.

Ms. Parks, who is now the Director of the Government-Wide Acquisition Contract Center, testified that beginning in 1996, she had been the Director of the agency's Solutions Development Center (SDC). *See* HT1, Vol. 1, at 24. She testified that in 1995, the regional offices of the FTS were trying to find a way to meet client agencies' requirements for hardware, software and non-complex integration services. She testified that in July 1996, the FTS National Program Office developed the Federal Acquisition Service for Technology, or FAST, Program. She testified the FAST Program used Multiple Award Schedules (MAS) for both hardware and software commodities. In this connection, she testified MASs are contracts set up by the FSS for a number of different products

and services that various government agencies might need. She compared the MAS to a catalogue in which an agency procurement officer might look for prices and information regarding computers, Xerox paper, and other items. *See id.* at 24-25.

Ms. Parks testified the Small Business Administration's (SBA) 8(a) Contracts were listed on the MASs, or regional MASs, as a source for various products and/or services. *See* HT1, Vol. 1, at 26. She testified the SBA 8(a) program allows firms to self-market their services or their products without competition up to a certain threshold. *Id.* She testified that eligibility for the 8(a) Program was limited to disadvantaged small businesses. She further testified the agency's Washington, DC Office set up one group of 8(a) Contracts, and the Kansas City Regional Office, where she worked, set up another set of contracts, in October 1997.

Ms. Parks testified that in the 1998-1999 timeframe, the agency consolidated the Washington, DC, and Kansas City FAST Contracts. *See* HT1, Vol. 1, at 31. She testified, however, client agencies were not using the FAST 8(a) Contracts because they did not want to compete every potential project with the 150 8(a) vendors on the MAS for non-complex integration services. She testified that because 8(a) companies are in a business development program, agencies were reluctant to "take a chance" on a vendor with whom the agency was unfamiliar. She testified, therefore, the agency went to the SBA and requested the authority to issue sole-source orders, without competition, from the FAST 8(a) MAS

Contract up to "a competitive threshold of $3 million." *Id.*

Ms. Parks testified orders over $3,000,000 had to be competed among the 150 vendors on the FAST 8(a) MAS. *See* HT1, Vol. 1, at 33. She testified for orders over that limit, agencies needed to use an automated e-mail system that notified all of the vendors of a request for price quotes on an anticipated project. She testified there is an exception to the $3,000,000 limit for orders where there is only one available source for a particular product or service. She testified there were also National Security exceptions, and an exception for "unique" products presumably made by only one vendor. *See id.* at 34. She testified, however, that the general rule required that any order above $3,000,000 needed to be competed among the "whole 8(a) community."

Mr. Cornell testified he was also involved in the creation of the FAST program during the late 1990s. *See* HT2, Vol. 2, at 22-30. He testified that when the FAST Contracts were first issued, the agency used an "innovative" random-draw method to determine which vendor would obtain the award. *See id.* at 49. He testified, however, that method "did not pan out real well," so the agency, the SBA, and the vendors decided the method of granting awards needed to be adjusted. He testified that, as a result of discussions among the various, stakeholders, the agency devised a system that allowed for vendors to identify a requirement and obtain a direct award, in essence, self-marketing, for orders under $3,000,000, but that still mandated a "mini-competition" among

the vendors for orders over that limit. He testified, therefore, the agency modified all of the FAST Contracts to allow for self-marketed orders under $3,000,000. *Id.*

In this connection, Mr. Cornell testified there were never any differences between the Washington, DC, and Kansas City Fast Contracts. *See* HT2, Vol. 2, at 57, and 142-147. Rather, he testified the 8(a) FAST Contracts do not, and never did, allow for unlimited self-marketing by vendors. *Id.*

Mr. Caffrey testified that there was no limitation to self-marketed orders from FAST 8(a) Vendors. *See* HT1, Vol. 2, at 276-287 and 327-340. In this connection, he testified that "if I self-market it, I get it, regardless of the amount." *See id.* at 329. He further testified that because everyone competed for the contract, there was never any need to have a second competition for the delivery orders. *See id.* at 332.

James Arrington, a Washington, DC based Information Technology Consultant, testified that he was a long-term employee of the agency who retired in 1999 as the Deputy Commissioner for Procurement, Information Technology. *See* HT1, Vol. 2, at 347. He testified that during the late 1990s, he was involved with the FAST Program, and is a recognized procurement expert. *See id.* at 500-507. He further testified that was no dollar limitation on self-marketed orders under the FAST 8(a) Contracts. *See id.* at 578.

To resolve the conflict between the testimony of Messrs. Caffrey and Arrington, and the testimony of Ms. Parks and Mr. Cornell, regarding the existence of a ceiling on self-marketed orders under the FAST 8(a) Program, I must make credibility determinations, and explain which testimony is either credible or not credible. *See Hillen*, 35 M.S.P.R. at 458. For several reasons, I find the testimony of Mr. Cornell and Ms. Parks credible, but not the testimony of Messrs. Caffrey and Arrington as to this issue.

First, I find that Mr. Cornell and Ms. Parks are simply in a better position to know what the requirements of the FAST 8(a) Program were, and how those requirements evolved. *See Hillen*, 35 M.S.P.R. at 458 (the witness's opportunity and capacity to observe the event or act in question is one factor an Administrative Judge may use to evaluate a witness's credibility). While Mr. Arrington apparently has expertise in procurement he does not, admittedly, have any expertise in fiscal law, such as Mr. Cornell has. *See* HT1, Vol. 2, at 505-512. Further, Mr. Arrington testified that in addition to not having any legal expertise, he never ordered any contracts, used an ILP for a transaction, or had any real familiarity with the FAR after approximately 1985. *Id.*

Similarly, Mr. Caffrey's knowledge is somewhat limited compared to Mr. Cornell and Ms. Parks's knowledge of the contracts' requirements. In this connection, I have given little evidentiary weight to the discussions Mr. Caffrey testified he had with Ms. Parks concerning the delivery orders

because I find that testimony relatively vague and tentative. *See* HT1, Vol. 2, at 279.

Second, I find the testimony of the agency's witnesses credible because it is consistent with other documentary evidence in the record. *See Hillen*, 35 M.S.P.R. at 458 (the consistency, or inconsistency, of the witness's testimony with other evidence of record is one factor an Administrative Judge may use to evaluate a witness's credibility). For example, the September 4, 1998 modification to the FAST contract states as follows:

The purpose of this modification is to revise contract clause H.3 Contract Maximum and Minimum as follows:

> The maximum contract amount is (not the contract guarantee) for any FAST Multiple award IDIQ contract is $90,000,000 per contract. The minimum guarantee for these contracts is $100.00 for the term of the contract. The SBA has authorized non-competitive task orders awarded sole source to 8(a) FAST contractors provided (1) such task orders are valued at or below the 8(a) competitive threshold and (2) that requirements valued at above the competitive threshold are not split resulting in multiple sole source task orders issued to individual terms. The 8(a) competitive threshold is $3,000,000. Noncompetitive task orders may be

> awarded as a result of an 8(a) contractor's self marketing efforts.

See Lock 1, Agency File, Tab 4p (at 38-39).[6] By letter dated May 20, 1998, William A. Fisher, the SBA's Acting Associate Administrator for Minority Enterprise Development, approved the agency's request for the modification quoted above. *See* Lock 5, AF, Tab 29 (Agency 2006 Hearing Exhibit 1).

I interpret the FAST Contract modification to include self-marketed efforts within the $3,000,000 limit. I find the last sentence of the modification cannot be interpreted, as the appellant has, to allow self-marketed orders in excess of $3,000,000. I find the appellant's interpretation would, in effect, nullify the preceding language by allowing non-competitive task orders exceeding the stated limitation. Rather, the last sentence of the modification only serves to describe a specific kind of acceptable non-competitive sole-source award, i.e., one that is self-marketed. For me to accept the appellant's interpretation, the last

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[6] During the processing of this appeal, and in the appellant's closing brief, she argued at length that the Kansas City Contract, but not the Washington, DC contract awarded to SMF, contained a $3,000,000 ceiling for self-marketed orders. *See* Lock 6, Tab 1 (Appellant's Closing Brief at 137-200). The agency argues there were no significant differences between the two contracts. I find the agency's arguments persuasive based on Mr. Cornell's credible testimony that there were no significant differences between the contracts. See *supra* p. 27. Further, I find it inherently implausible that the two contracts would contain a glaring difference between them such as the sole-source limitation at issue. *See Hillen*, 35 M.S.P.R. at 458 (the inherent improbability of a witness's testimony is one factor an Administrative Judge may use to evaluate a witness's testimony).

sentence of the modification would need to specifically state self-marketed orders may exceed the $3,000,000 limitation, or language to that effect. I agree with Mr. Cornell that one with "knowledge of the English language and [sic] legal training" will inevitably come to the conclusion that the modification's $3,000,000 limitation applies to self-marketed orders. *See* HT2, Vol. 1, at 141.

In addition, I find it inherently implausible that government contracting rules would allow self-marketed orders over a certain limitation to be awarded without competition. *See Hillen,* 35 M.S.P.R. at 458 (the inherent improbability of a witness's version of events is one factor an Administrative Judge can use to evaluate a witness's credibility). The essence of transparency in government contracting must be the presence of genuine competition. I find the absence of competition, particularly for large awards, would severely undermine the integrity of the government's contracting processes.

Therefore, I find the agency established by preponderant evidence the appellant's initial order exceeded the competitive requirements of the FAST Contract. Accordingly, this portion of the agency's specification is SUSTAINED.

B. February 14, 2001 Modification for 65,000 Seats of Risk Manager and Policy Director.

It is undisputed the appellant's modification to the order involved a task order priced at $9,533,935. *See* Lock 1, Appellant's Exhibit A (at 73).

Because the price of this order exceeded the $3,000,000 limitation for sole source, or self marketed, orders under the FAST Contract, I find the agency established by preponderant evidence the appellant's modified order exceeded the competitive requirements of the FAST Contract. Accordingly, the agency's specification, and its charge, are SUSTAINED.

The agency did not violate the appellant's due process rights as set forth in Stone v. Federal Deposit Insurance Corporation, 179 F.3d 1368, 1376 (Fed. Cir. 1999).

The appellant alleges the agency denied her constitutional right to due process of law. *See* Lock 6, AF, Tab 1 (Appellant's Closing Brief at 224-234), In this connection, she alleges that prior to the issuance of the agency's decision letter, Ms. Gladys, the deciding official, had improper *ex parte* contacts with both the proposing official, Ms. Jamini-Ramirez, and Ms. Parks, who during the relevant time period was the Director of the Solutions Development Center (SDC). The appellant further alleges Ms. Jamini-Ramirez had improper *ex parte* contacts with Ms. Parks prior to the issuance of the agency's proposal letter. *Id.*

Regulations promulgated by the Office of Personnel Management under 5 U.S.C. § 7513(a) and (b) provide that the agency shall designate an official to hear an employee's oral answer who has authority either to make or recommend a final decision on the proposed adverse action. *See* 5 C.F.R. § 752.404(c)(2). In arriving at its decision, the agency

must consider any answer of the employee and/or his representative made to the designated official. *See* 5 C.F.R. § 752.404(f).

In *Stone v. Federal Deposit Insurance Corp.*, 179 F.3d 1368, 1375-76 (Fed. Cir. 1999), the court held that a federal employee such as the appellant in this case, i.e., an employee covered under 5 U.S.C. § 7501, had a property interest in his continued employment, and that he could not properly be deprived of that interest without due process of law, that is, without notice of the charges against him, an explanation of the employer's evidence, and an opportunity to respond. It also held that the employee's due process rights could be violated by the deciding official's receipt, on an *ex parte* basis, of "additional material information that [might] undermine the objectivity required to protect the fairness of the process." *See id.* at 1376.

The court held further, however, that "not every *ex parte* communication [was] a procedural defect so substantial and so likely to cause prejudice" that it was fatal to the action at issue, and that only those that "introduce[d] new and material information to the decision official [would] violate the due process guarantee of notice." *See Stone*, 179 F.3d at 1376-77. Factors relevant in determining whether there was such a violation include the following: 1) Whether the communication introduced new information or information that was merely cumulative; 2) whether the employee knew of the communication and had an opportunity to respond to it; and 3) "whether the *ex parte* communications were of the type likely to result in undue pressure

upon the deciding official to rule in a particular manner." *See id* at 1377; *Gerges v. Department of the Army*, 89 M.S.P.R. 669, 679-680 (2001). The "[u]ltimate[ ] . . . inquiry" with respect to this issue "is whether the *ex parte* communication is so substantial and so likely to cause prejudice that no employee can fairly be required to be subjected to a deprivation of property under such circumstances." *Id.*

At the outset, I note there is nothing in the *Stone* decision to suggest its holding includes any potential *ex parte* contacts to a proposing official, as well as a deciding official. Indeed, I find it difficult to see how *Stone* could be expanded to apply in cases involving *ex parte* contacts with a proposing official. In any event, I find this argument unpersuasive

As to Ms. Gladys's *ex parte* contacts, the appellant has provided a November 15, 2003 e-mail Ms. Gladys sent to Ms. Parks. *See* Lock 1, Appellant's Exhibit JJ (at 545). In that e-mail, Ms. Gladys asks whether one can use a FAST contract to order only software commodity products, and not services. *Id.* In Ms. Parks's reply, she states a FAST contract can be used to order software when the vendor is going to install software to provide an integrated system. *Id.*

Despite these contacts, however, I find the agency did nothing to violate the appellant's right to due process of law. Under the first *Stone* factor, I find there is nothing in this communication to indicate Ms. Gladys received new information from Ms. Parks. In fact, Ms. Gladys states in her e-mail

she knows "the answer to [her] question," but has decided to "double check" with Ms. Parks. *See* Lock 1, Appellant's Exhibit JJ (at 545). There is nothing to suggest this communication led to the addition of any information to which the appellant did not have an opportunity to respond. Both the proposal letter and the decision letter stated the appellant had improperly used a "services" contract to issue a delivery order for a commodity. As to the second *Stone* factor, there is no evidence to show the agency informed the appellant prior to the issuance of the decision letter that Ms. Gladys had e-mailed Ms. Parks. On the other hand, under the third *Stone* factor, I see nothing to suggest this insignificant communication was likely to result in undue pressure on Ms. Gladys to remove the appellant from the agency.

Although I have not sustained this specification of the agency's charge regarding the lack of services in the delivery orders, I find the agency was consistent with regard to the reasons why they thought the transaction was improper. In my view, the agency provided the appellant with all of the relevant information it had so she could properly respond to the charge, and there was nothing in Ms. Gladys's communication with Ms. Parks that was so "substantial" and so "likely to cause prejudice" as to constitute a denial of due process.

The appeal must be remanded for further consideration of the agency's penalty because I have not sustained all of the agency's specifications.

Although the agency removed the appellant based on the single charge of engaging in improper contracting procedures, I have not sustained two of the three specifications that form that charge. I find the agency must, therefore, reconsider the appropriateness of its penalty. *See Modrowski v. Department of Veterans Affairs*, 252 F.3d 1344, 1353 (Fed. Cir. 2001). In this connection, I note Ms. Gladys, the deciding official, did not address in her testimony what action she might have taken in the event that some of the agency's specifications were not sustained on appeal. Rather, she testified that these "charges" were "more sequential than anything else," and she could not separate, apparently, any part from the whole and make a hypothetical determination as to what penalty she would have imposed if I were to not sustain the entire charge. *See* HT1, Vol. 1, at 202-203.

It is well-established that, in its consideration of a penalty, the Board will "accord proper deference to the agency's primary discretion in managing its workforce." *See Coffee v. Department of Justice*, 89 M.S.P.R. 36, ¶ 8 (2001). The Board may not independently determine penalties. *See Lachance v. Devall*, 178 F.3d 1246, 1259 (Fed. Cir. 1999). The court has held that when "the most serious charges or a majority of the charges have been invalidated, it may be appropriate for [the court] to vacate the penalty and remand for reconsideration of the penalty in light of the significant change in the number and seriousness of the sustained charges." *See Hathaway v. Department of Justice*, 384 F.3d 1342, 1353 (Fed. Cir. 2004). In light of Ms. Gladys's testimony regarding the penalty, and the highly

technical nature of the misconduct at issue, I find the parties' interests can best be served by remanding the appeal to the agency so it can reevaluate the appropriateness of the penalty by considering only the specification that I sustained. *See Modrowski*, 252 F.3d at 1349.

DECISION

The agency's action is REVERSED in part, SUSTAINED in part, and REMANDED for further consideration.

ORDER

Accordingly, I remand this appeal to the agency so it may select an appropriate penalty consistent with the findings in this decision. Because the agency may again decide that removal is the appropriate penalty notwithstanding my reversal of part of Ms. Gladys's decision, I am not ordering interim relief or the payment of back pay at this stage of the appeal. The agency must complete its reevaluation of the agency's penalty within 60 days of the date of this Order, unless either party decides to file a petition for review of this decision.

FOR THE BOARD:

/s/
Jeremiah Cassidy
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **April 19, 2007,** unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. You must establish the date on which you received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you claim that you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional, information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5., 6, and 11.

ENFORCEMENT

If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask

the Board to enforce its decision by filing a petition for enforcement with this office, describing specifically the reasons why you believe there is noncompliance. Your petition must include the date and results of any communications regarding compliance, and a statement showing that a copy of the petition was either mailed or hand-delivered to the agency.

Any petition for enforcement must be filed no more than 30 days after the date of service of the agency's notice that it has complied with the decision. If you believe that your petition is filed late, you should include a statement and evidence showing good cause for the delay and a request for an extension of time for filing.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

Appellant

U.S. Mail VelmaY.Lock
35648 Terrace Drive
Fremont, CA 94536

Appellant Representative

U.S. Mail Renn C. Fowler, Esq.
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Belfast, ME 04915

Agency Representative

U.S. Mail Deborah Finch, Esq.
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450 Golden Gate Avenue
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San Francisco, CA 94102-3434

March 15, 2007
(Date)

/s/
Cynthia L. Boston
Paralegal Specialist

[ENTERED: August 10, 2009]

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2009-3080

VELMA Y. LOCK,

Petitioner,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Petition for review of the Merit Systems Protection Board in SF0752040183-I-7.

ORDER

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

Before Mayer, Circuit Judge, Bryson, Circuit Judge, and Spencer, Chief District Judge.*

A petition for rehearing having been filed by the Petitioner,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on August 31, 2009.

FOR THE COURT,

/s/
Jan Horbaly
Clerk

Dated: 08/10/2009

*Honorable James R. Spencer, Chief Judge, United States District Court for the Eastern District of Virginia, sitting by designation.

cc: Renn C. Fowler
Lauren A. Weeman

LOCK V GSA, 2009-3080
(MSPB - SF0752040183-I-7)

Federal Circuit Rule 36. Entry of Judgment - Judgment of Affirmance Without Opinion

The court may enter a judgment of affirmance without opinion, citing this rule, when it determines that any of the following conditions exist and an opinion would have no precedential value:

(a) the judgment, decision, or order of the trial court appealed from is based on findings that are not clearly erroneous;

(b) the evidence supporting the jury's verdict is sufficient;

(c) the record supports summary judgment, directed verdict, or judgment on the pleadings;

(d) the decision of an administrative agency warrants affirmance under the standard of review in the statute authorizing the petition for review; or

(e) a judgment or decision has been entered without an error of law.